

PD-0474-19

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/8/2020
DEANA WILLIAMSON, CLERK

JAMES RAY PENDERGRAFT

Appellant,

v.

THE STATE OF TEXAS

Appellee

On Petition for Discretionary Review From the
Twelfth Court of Appeals, Cause 12-18-00091-CR
Trial Cause No. 007-1264-17

ORAL ARGUMENT NOT REQUESTED

Austin Reeve Jackson
Texas Bar No. 24046139
PO Box 8355
Tyler, TX 75711
Telephone: (903) 595-6070
Facsimile: (866) 387-0152

IDENTITY OF PARTIES AND COUNSEL

Attorney for Appellant

Appellate Counsel:
Austin Reeve Jackson
PO Box 8355
Tyler, TX 75711

Appellate Counsel in Lower Court:
James Huggler
100 E. Ferguson
Tyler, TX 75702

Attorney for the State

Appellate Counsel:
Michael J. West
Assistant District Attorney, Smith County
4th Floor, Courthouse
100 North Broadway
Tyler, TX 75702

Trial Counsel:
Jacob Putman
Smith County District Attorney
4th Floor, Courthouse
100 North Broadway
Tyler, TX 75702

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....	ii
TABLE OF CONTENTS	iii
INDEX OF AUTHORITIES.....	iv
STATEMENT OF THE CASE	2
STATEMENT REGARDING ORAL ARGUMENT	2
ISSUES PRESENTED.....	3
STATEMENT OF FACTS.....	4
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	7
I. DID THE TWELFTH COURT OF APPEALS ERR BY DETERMINING THAT THE APPEAL WAS FRIVOLOUS AND GRANTING APPELLATE COUNSEL'S MOTION TO WITHDRAW PRIOR TO ENSURING THAT APPELLANT HAD ACCESS TO THE RECORD IN ORDER TO MAKE A <i>PRO SE</i> RESPONSE?.....	7
<i>Kelly v. State</i>	7
Attempts by the Lower Courts to Comply with <i>Kelly</i> in this Case	9
<i>Armandariz v. State</i>	12
Because the Twelfth Court Erred, the Court Should Reverse and Remand this Case.....	13
II. WHEN AN APPELLANT FILES A MOTION SEEKING ACCESS TO THE RECORD TO RESPOND TO COUNSEL'S <i>ANDERS</i> BRIEF, WHO IS RESPONSIBLE FOR ENSURING THAT SUCH ACCESS HAS OCCURRED?	15
The Court Correctly Resolved this Issue in <i>Kelly</i>	16

TABLE OF CONTENTS (CON'T)

III. ARE AN INDIGENT APPELLANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS VIOLATED WHEN AN APPELLATE COURT SEEKS TO CHARGE HIM FOR COPIES OF THE APPELLATE RECORD FOR PURPOSES OF FILING A <i>PRO SE</i> PDR?	20
<i>Griffin v. Illinois</i>	21
Current Texas PDR Process	22
It is Time to Revisit the Court's Prior Holdings	23
CONCLUSION AND PRAYER	25
CERTIFICATE OF SERVICE	26
CERTIFICATE OF COMPLIANCE	26
APPENDIX A	27
APPENDIX B	33
APPENDIX C	35
APPENDIX D	39
APPENDIX E	42

INDEX OF AUTHORITIES

UNITED STATES SUPREME COURT:

- Anders v. California*,
386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)..... *passim*
- Griffin v. Illinois*,
351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956)..... 21, 22, 23

TEXAS COURT OF CRIMINAL APPEALS:

- Ex parte Jarrett*,
891 S.W.2d 935 (Tex.Crim.App. 1995) 23
- Ex parte Trainer*,
181 S.W.3d 358 (Tex.Crim.App. 2005) 22-23
- Hawkins v. State*,
515 S.W.2d 275 (Tex.Crim.App. 1974) 13
- Kelly v. State*,
436 S.W.3d 313 (Tex.Crim.App. 2014) *passim*
- Pecina v. State*,
361 S.W.3d 68 (Tex.Crim.App. 2012) 24 n.10
- Romero v. State*,
800 S.W.2d 539 (Tex.Crim.App. 1990) 24 n.10

TEXAS COURTS OF APPEAL:

<i>Armandariz v. State</i> , 36 S.W.3d 3 (Tex.App.—Fort Worth 2016)	12, 14, 18
<i>Escobar v. State</i> , 134 S.W.3d 338 (Tex.App.—Amarillo 2003).....	14
<i>Pendergraft v. State</i> , No. 12-18-00091-CR, 2019 Tex.App.LEXIS 3133 (Tex.App.—Tyler 2019)	4, 11, 12
<i>Stanley v. State</i> , 523 S.W.3d 122 (Tex.App.—Waco 2015)	18 n.7, 19
<i>Wilson v. State</i> , 955 S.W.2d 693 (Tex.App.—Waco 1997)	14

STATUTES AND OTHER SOURCES:

Annual Statistical Report for the Texas Judiciary, Fiscal Year 2018, https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf	23, 24
Lethally Deficient, Direct Appeals in Texas Death Penalty Cases, Texas Defender Service, 2016, http://texasdefender.org/wp-content/uploads/TDS-2016-LeathallyDeficient-Web.pdf	17
TEX. DISCIPLINARY R. PROF'L CONDUCT.....	17
TEX. R. APP. PROC. 66.2.....	22
TEX. R. APP. PROC. 68.1.....	22
TEX. R. APP. PROC. 68.4.....	22
U.S. CONST. AMEND. XIV	21

PD-0474-19

**IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

JAMES RAY PENDERGRAFT

Appellant,

v.

THE STATE OF TEXAS

Appellee

On Petition for Discretionary Review From the
Twelfth Court of Appeals, Cause 12-18-00091-CR
Trial Cause No. 007-1264-17

TO THE HONORABLE JUDGES OF THE COURT:

Comes now, James Pendergraft, by and through his attorney of record, Austin Reeve Jackson, and files this his brief pursuant to the Texas Rules of Appellate Procedure, and would show the Court as follows:

STATEMENT OF THE CASE

This appeal comes from Mr. James Pendergraft's conviction for the offense of felony offense of aggravated assault rendered against him in the Seventh District Court of Smith County in March of 2018. (I CR 66). After pleading "not guilty" and proceeding to a jury trial, Mr. Pendergraft was convicted and sentenced to serve a term of thirty-five years' confinement. (I CR 66-67). His direct appeal resulted in the conviction being affirmed by the Twelfth Court of Appeals in April of 2019. Slip Op. 3. Mr. Pendergraft then timely filed a *pro se* petition for discretionary review which was granted on 23 October.

STATEMENT REGARDING ORAL ARGUMENT

When it granted Mr. Pendergraft's *pro se* petition for discretionary review the Court noted that oral argument would not be granted. If, however, the Court's position on that issue changes, Counsel would request the opportunity to be present at, and participate in, oral argument.

ISSUES PRESENTED

- I. DID THE TWELFTH COURT OF APPEALS ERR BY DETERMINING THAT THE APPEAL WAS FRIVOLOUS AND GRANTING APPELLATE COUNSEL'S MOTION TO WITHDRAW PRIOR TO ENSURING THAT APPELLANT HAD ACCESS TO THE RECORD IN ORDER TO MAKE A *PRO SE* RESPONSE?
- II. WHEN AN APPELLANT FILES A MOTION SEEKING ACCESS TO THE RECORD TO RESPOND TO COUNSEL'S *ANDERS* BRIEF, WHO IS RESPONSIBLE FOR ENSURING THAT SUCH ACCESS HAS OCCURRED?
- III. ARE AN INDIGENT APPELLANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS VIOLATED WHEN AN APPELLATE COURT SEEKS TO CHARGE HIM FOR COPIES OF THE APPELLATE RECORD FOR PURPOSES OF FILING A *PRO SE* PDR?

STATEMENT OF FACTS

Following a jury trial in the Seventh District Court of Smith County, Petitioner, Mr. James Pendergraft, was convicted of aggravated assault and sentenced to serve a term of thirty-five years' confinement. (I CR 66-67). He then timely appealed his conviction to the Twelfth Court of Appeals. (I CR 70).

In the Twelfth Court, Mr. Pendergraft's appellate counsel determined that he was unable to raise any non-frivolous issue and filed an *Anders* brief. *Pendergraft v. State*, No. 12-18-00091-CR, 2019 Tex.App.LEXIS 3133 at *2 (Tex.App.—Tyler April 17, 2019, pet. granted) (not designated for publication). In accordance with his responsibilities, appellate counsel assisted Mr. Pendergraft in filing a motion for access to the record for purposes of making a *pro se* response to the *Anders* brief. *Id.* at *2 n.3. Once that motion was filed the trial court was ordered by the Twelfth Court to make the records available to Mr. Pendergraft. (I CR Supp.1 1).¹ In response, the trial court ordered that the records be put on a compact disk and sent to Mr. Pendergraft at his TDCJ unit. (I CR Supp.1 4).

¹ "I CR Supp.1" refers to the Supplemental Clerk's Record filed with the Twelfth Court of Appeals on 20 November 2018, and "I CR Supp.2" to the Supplemental Clerk's Record filed with the same court on 29 December 2018.

Unfortunately, when the CD containing the records arrived at TDCJ, the disc was confiscated as inmates are prohibited from receiving or having access to them. (Appendix A at 2). Mr. Pendergraft notified the Twelfth Court of this circumstance and requested a paper copy of the records. (Appendix A at 3). The Twelfth Court denied that request and subsequently affirmed the conviction after conducting their own review of the records and granted appellate counsel's motion to withdraw. (Appendix B).

Mr. Pendergraft has now filed a *pro se* petition for discretionary review which has been granted by the Court. This brief follows.

SUMMARY OF THE ARGUMENT

In *Kelly v. State*, this Court imposed a duty on appellate courts that they ensure that an appellant who desires access to the record to file a response to an *Anders* brief actually gets that access. Where, as here, the intermediate court is aware that access to the record was attempted but also has reason to believe that the attempted access did not actually occur, an appellate court errs in deciding the merits of the *Anders* brief and appellate counsel's motion to withdraw before ensuring that the record has, in fact, been provided to appellant. Such error re-

quires reversal of the lower court's judgment and a remand of the case to the appellate court.

Additionally, the Court correctly decided in *Kelly* that individual appellate and trial courts should be able to examine the circumstances of each case and craft a resolution that provides adequate access to the record to an appellant who seeks it. In the end, however that access occurs, an appellate court remains in the best position to ensure that it has actually occurred and to take any action necessary to enforce an appellant's right to access those records.

Finally, the Court should reverse its prior holding that an appellant is not entitled to a free copy of the record for purposes of preparing a petition for discretionary review. Given the high rate of reversal on discretionary review but the low likelihood of having a petition for discretionary review initially granted, coupled with the extraordinary volume of petitions the Court must review, access to the record is critical in preparing a petition that adequately brings to the Court's attention the potential issues before it. When access to the record is limited by one's financial circumstances and ability to pay for that access, and by

extension to pay for access to the Court, a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment occurs.

ARGUMENT

I. DID THE TWELFTH COURT OF APPEALS ERR BY DETERMINING THAT THE APPEAL WAS FRIVOLOUS AND GRANTING APPELLATE COUNSEL’S MOTION TO WITHDRAW PRIOR TO ENSURING THAT APPELLANT HAD ACCESS TO THE RECORD IN ORDER TO MAKE A *PRO SE* RESPONSE?

This Court has established that an intermediate court has an obligation to ensure that an appellant who seeks access to a record for purposes of making a *pro se* response to an *Anders*² brief actually obtains that access. Because the Twelfth Court in this case decided the merits of appellate counsel’s *Anders* brief and affirmed the conviction without first ensuring that Mr. Pendergraft had actually been given access to the records as he requested, the Court should reverse the lower court’s judgment.

***Kelly v. State*³**

In *Kelly* the Court held that it was error for an intermediate appellate court “to grant an appointed counsel’s motion to withdraw and

² *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

³ 436 S.W.3d 313 (Tex.Crim.App. 2014).

declare the appellant's appeal to be frivolous without first satisfying the appellant's express request to gain access to the appellate record" for purposes of responding to an *Anders* brief. *Kelly*, 436 S.W.3d at 322. In crafting its opinion the Court outlined two sets of responsibilities to ensure that an appellant's rights were protected. *Id.* at 318-321.

The first of those two sets was directed at appellate counsel. *Id.* at 318. In essence, the Court determined, in addition to the traditional requirements that accompany the filing of an *Anders* brief, that appellate counsel was also obligated to "take concrete measures to initiate and facilitate the process of actuating his client's right to review the appellate record...." *Id.* at 319. Effectively, that means providing an appellant with a pre-drafted motion to inspect the trial record that requires no more than the client's signature and return to the appellate court. *Id.* at 320.

The second set of responsibilities focused on the duties of the intermediate court. *Id.* at 320. These responsibilities would apply once an appellant has filed with the court "his motion to make the appellate record available." *Id.* Recognizing that each of Texas' intermediate courts had their own practices for ensuring that this duty was met, the

Court added the lone requirement that the lower court enter “a formal written order specifying the procedure to be followed in the particular case” and then “continue to monitor the situation.” *Id.* at 321. An intermediate court may not, though, “rule on the validity of appellate counsel’s motion to withdraw and *Anders* brief until it has satisfied itself that the appellant has been able to access the appellate record to prepare his response.” *Id.* at 322. Importantly, this means that “the court of appeals has the ultimate responsibility to make sure ... the appellant is granted access to the appellate record....” *Id.* at 315.

Attempts by the Lower Courts to Comply with *Kelly* in this Case.

After appellate counsel filed in this case an *Anders* brief, Mr. Pendergraft filed a motion for access to the records in order to make a *pro se* response. (I CR Supp.1 1). In response, and in accordance with *Kelly*, the Twelfth Court of Appeals ordered the trial court to “ensure that Appellant has the opportunity to fully examine the appellate record....” (*Id.*). Shortly thereafter the trial court held a hearing in response to the order and made the following findings:

1. Mr. Pendergraft desired to file a *pro se* response to the Anders brief;
2. Mr. Pendergraft was bench warranted back to Smith County from TDCJ-ID and the record made available to him while he was in custody in Smith County;
3. Mr. Pendergraft was unable to read or write and, therefore, was using the assistance of a “writ writer” at his TDCJ unit to help prepare his filings; and
4. As such, he would need a copy of his records at his TDCJ unit to review with that individual.

(I CR Supp.1 4). After making these findings, on 12 November 2018 the trial court further ordered the Smith County District Clerk to “prepare a complete electronic copy of the appellate record in this case and place same on a CD and forward same to Defendant at his unit by certified mail.” (*Id.*).

A month later, on 19 December, appellate counsel filed on behalf of Mr. Pendergraft a motion to extend the time to file his *pro se* brief because, although the trial court had ordered the records to be sent to TDCJ, Mr. Pendergraft had not yet received them. (Appendix C at ¶ 8). In response, the Twelfth Court ordered the trial court to ensure that “Appellant receives an electronic copy of the appellate record” in accordance with the trial court’s previous findings. (I CR Supp.2 5). A

copy of the records was then sent, by certified mail, to Mr. Pendergraft at the Gurney Unit. (I CR Supp.2 6).

On 10 January Mr. Pendergraft sent a letter to the Twelfth Court of Appeals informing the court that he had not yet received the records.⁴ (Appendix A). Although he stated he had received an envelope bearing the same certified mail number referenced by the trial court in its response to the Twelfth Court, that envelope was empty as the CDs inside had been confiscated. (Appendix A at 2-4). Given that TDCJ inmates are not allowed to possess CDs, Mr. Pendergraft asked that the Twelfth Court ensure he had paper copies of the record. (*Id.*). This request was overruled by the Twelfth Court. (Appendix B).⁵

Ultimately, the case was affirmed after the court undertook its own review of the record. *Pendergraft*, 2019 Tex.App.LEXIS 3133 at *1. In its opinion, the Twelfth Court noted that appellate counsel had complied with his duties under *Kelly* and that:

⁴ Because Mr. Pendergraft cannot write, the letter was sent on his behalf by another inmate. (Appendix A at 3).

⁵ The court overruled the motion, not on its merits, but because it lacked a certificate of service. Nonetheless, by way of that motion the court was aware that the Mr. Pendergraft had not yet had access to the record and his technical error does not absolve the Court of their obligation under *Kelly* to see that he had been given access to the appellate record. *Kelly*, 436 S.W.3d at 322,

Appellant was given time to file his own brief. The time for filing such a brief has expired and no *pro se* brief has been filed.

Id. at *2 n.3.

*Armandariz v. State*⁶

The case before the Court is almost identical to that reviewed by the Second Court of Appeals in *Armandariz v. State*. There, after the filing of an *Anders* brief, an appellant sought access to the trial records for the purpose of making a *pro se* response. *Armandariz*, 536 S.W.3d at 3. As happened here, the trial court in *Armandariz* sent the appellant at TDCJ both paper documents “and a disk containing audio and video exhibits.” *Id.* at 4. The trial court further notified the warden of that unit that the appellant “is to have supervised access to a computer upon which to review the above mentioned audio/video exhibits.” *Id.* However, the warden declined to comply with that order and, instead, returned the disk to the court with the following statement:

I am returning the CD containing audio and video exhibits in reference to the above named/numbered offender. All other contents of the package have been delivered this date. TDCJ offenders are not permitted access to CD’s nor computer equipment with which to view the contents of the CD.

⁶ 536 S.W.3d 3 (Tex.App.—Fort Worth 2016, no pet.).

Id.

Holding that under these circumstances the trial court had attempted to comply with the requirements of both the appellate court and *Kelly* but had been thwarted in doing so by TDCJ regulations, the Second Court abated the appeal and remanded the case to the trial court to, among other options, “bench warrant [appellant] back to the trial court so that he has an opportunity to review the CD that was returned by his prison unit.” *Id.* at 4-5. Relying on this Court’s holding in *Kelly* the court explained:

Although the trial court clerk diligently complied with our order, the record does not reflect, and we are not satisfied, that [appellant] has received access to the complete appellate record. ... As such, we may not move forward with determining the validity of the *Anders* brief filed by [] court appointed counsel.

Id. at 4 (*citing Kelly*, 436 S.W.3d at 320).

Because the Twelfth Court Erred, the Court Should Reverse and Remand this Case.

The opportunity to file a *pro se Anders* response necessarily implies an opportunity for an appellant to review the appellate record. *Hawkins v. State*, 515 S.W.2d 275, 276 (Tex.Crim.App. 1974). When courts are faced with circumstances such as those present here or in

cases like *Armandariz*, an appellate court should take steps to ensure that an appellant has in fact been able to review his records. *Kelly*, 436 S.W.3d at 315, 322. The burden to do so is light and the risk to indigent, incarcerated individuals of not doing so is great which is why courts are so often willing to extend time and effort to ensure that that meaningful access has occurred. *Escobar v. State*, 134 S.W.3d 338, 339 (Tex.App.—Amarillo 2003, no pet.); *Wilson v. State*, 955 S.W.2d 693, 696 (Tex.App.—Waco 1997, no pet.).

Here, the record reveals that at the time it proceeded to render a decision in this case, the Twelfth Court knew only that Mr. Pendergraft had requested access to the appellate record to exercise his right to file a *pro se* response and that a copy of the record had been *sent* to Mr. Pendergraft. (I CR Supp.2 6). However, there was no indication that Mr. Pendergraft had actually *received* those records. (*Id.*). Indeed, the court was aware from Mr. Pendergraft's 10 January letter that he had not received the records because TDCJ had confiscated the disc on which they had been sent. (Appendix A at 2). Under such circumstances, the Twelfth Court should have taken additional steps, such as granting Mr. Pendergraft's request for a paper copy of the record, to ensure

that he had access to the record before the court rendered a decision in this case. *Kelly*, 436 S.W.3d at 315, 322. Because it failed to do so, the Twelfth Court erred, failed to comply with this Court’s holding in *Kelly* and, therefore, their judgment should be reversed and the case remanded for further proceedings.

II. WHEN AN APPELLANT FILES A MOTION SEEKING ACCESS TO THE RECORD TO RESPOND TO COUNSEL’S *ANDERS* BRIEF, WHO IS RESPONSIBLE FOR ENSURING THAT SUCH ACCESS HAS OCCURRED?

As previously noted, in *Kelly*, the Court clarified the responsibilities of both appointed counsel and an intermediate court in facilitating a *pro se* response to an *Anders* brief. Namely, the Court held that appellate counsel must provide an appellant with a motion to inspect the records needing only appellant’s signature, and a court, upon receipt of that motion, must enter a written order granting the motion, specifying the procedure to be followed in a particular case, and then taking steps to ensure compliance with that order. *Kelly*, 436 S.W.3d at 320-31. Importantly, once appellate counsel has satisfied his obligation and an appellant files a motion to access records with the appellate court, “the

onus shift[s] to the court of appeals to ensure that, one way or another, this request is satisfied.” *Id.* at 320.

The Court Correctly Resolved this Issue in *Kelly*.

In her dissent in *Kelly*, Judge Alcala raised concerns that this procedure would “impose new requirements on the courts of appeals[,] result in an unnecessary micro-managing of those courts’ administrative processes[,] and will absolve appellate lawyers in *Anders* cases of their ethical duty to assist their clients” until their motion to withdraw is granted. *Id.* at 324 (Alcala, J., concurring). As such, Judge Alcala argued that when an appellant requests a copy of the record post-*Anders* brief, appellate counsel should be “responsible for taking all the necessary steps to ensure that a defendant actually receives access to the record.” *Id.*

If the Court is taking this opportunity to revisit its holding in *Kelly*, counsel would urge the Court to affirm its prior decision for several reasons. First, one must recognize that there have certainly been egregiously poor ethical decisions by appellate lawyers in the past that more than justify Judge Alcala’s concerns that some might assert the *Kelly* opinion as providing cover for doing less work on behalf of one’s client.

Kelly, 436 S.W.3d at 323; *see, e.g., Lethally Deficient, Direct Appeals in Texas Death Penalty Cases*, Texas Defender Service, 2016, at 55, <http://texasdefender.org/wp-content/uploads/TDS-2016-LethallyDeficient-Web.pdf> (“Texas defense lawyers have submitted appellate briefs that fall well below accepted standards for defense performance ... [i]nsufficient legal briefing, pervasive use of boilerplate...”). But the Disciplinary Rules remain applicable regardless of this court’s holding and continue to be enforceable against attorneys, including the zealous representation of one’s client. TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 3. Also applicable would be the requirement that appellate counsel provide to appellant any part of the record maintained in his file. *Id.* at 1.15(d). And certainly a trial or appellate court could, as some do, order appellate counsel to provide to an appellant a copy of those records to which appellate counsel has access. *Kelly* 436 S.W.3d at 317, 320 n.22, 321 n.24, n.25

Two potential problems exist though with placing the burden to provide the appellate record solely on appellate counsel. One is that often appellate counsel does not have access to the full record. Consider an appeal from a case involving a CAC interview, child pornography, or

other evidence or records that have been sealed and to which appellate counsel may have only had temporary access, but not a copy, through the court reporter or trial court. Indeed, even video or audio evidence introduced at trial and provided to appellate counsel in the form of his own copy would be subject to the same restrictions the court ran into in *Armandariz* – if a district court cannot order TDCJ to provide an inmate with accesses to digital records an appellant’s counsel will fare no better. *Armandariz*, 536 S.W.3d at 4.

This raises the second potential problem with requiring appellate counsel to facilitate the provision of the record to an appellant – counsel cannot only not order TDCJ to permit access to certain materials or types of media, but counsel cannot order the same of a trial court.⁷ Thus, where the identifying information of potential jurors has been sealed but appellant believes there may be a *Batson* issue, or the trial court made rulings after an in camera review of what is now sealed evi-

⁷ In *Stanley v. State*, the Tenth Court of Appeals reasoned that “it is counsel, and not the district court clerk, that is in the best position to work with the wardens, guards, and prison librarians to facilitate an inmate’s access to the record.” *Stanley v. State*, 523 S.W.3d 122, 125 (Tex.App.—Waco 2015, no pet.). The difficulties encountered by the trial court in both this case and in *Armandariz* would seem to support the conclusion that this is not the case.

dence, appellate counsel has no way to force a trial court to permit him to copy that information for the purposes of providing it to appellant.

Fortunately, as the Court recognized in *Kelly*, intermediate courts, and those who regularly practice in them, have devised processes “that effectively address the matter.” *Id.* at 322 (Keller, P.J., concurring). Those processes allow appellate courts to tailor the requirements in a given case to means that best suit the specific circumstance. Thus, sometimes a court may require an attorney to provide the record while on other occasions that obligation falls to the district court, the appellate court, or their designee. *Id.* at 317, 320 n.22, 321 n.24, n.25; *see also Stanley*, 523 S.W.3d at 123-24. In reality, it is often a combination of efforts that ensure the record was actually provided to an appellant.⁸ *Id.* The only thing *Kelly* really changed for the appellate courts was to clarify that they had a continuing obligation to ensure that access to records had actually been provided by someone – not that they themselves provide the records. *Id.* at 315.

⁸ Indeed, in this case Mr. Pendergraft’s appellate counsel filed multiple motions with the appellate court and took steps to contact the trial court to ensure that the record was provide to Mr. Pendergraft after such access was ordered by the appellate court. (e.g., Appendix C).

As Chief Judge Keller has written, given the wide variety of cases they see and their familiarity with the records and evidence involved in a specific case, intermediate appellate courts are in a great position to craft responses to *pro se* requests to inspect appellate records that ensure a proper result. *Id.* at 322. For the same reason, Petitioner would urge the Court to continue to allow appellate courts the discretion to design individual responses to individual circumstances, in concert with trial courts and appellate practitioners, that satisfy the goals stated by the Court in *Kelly* while avoiding “blanket rules for the treatment of appellate records in all *Anders* appeals which ... are already being appropriately addressed by the courts of appeals at present.” *Id.* at 324.

III. ARE AN INDIGENT APPELLANT’S DUE PROCESS AND EQUAL PROTECTION RIGHTS VIOLATED WHEN AN APPELLATE COURT SEEKS TO CHARGE HIM FOR COPIES OF THE APPELLATE RECORD FOR PURPOSES OF FILING A PRO SE PDR?

After the Twelfth Court of Appeals affirmed his conviction and granted appellate counsel’s motion to withdraw, Mr. Pendergraft sought access to the appellate record for purposes of filing a petition for discretionary review with this Court. (Appendix D). He was unable to obtain that record from the Twelfth Court because he could not afford the

\$688.00 the court told him that record would request. (Appendix E). Because this leaves him unable to avail himself of the PDR process in the same manner as others simply because he is indigent, the Court should hold that the imposition of costs for a record necessary to adequately file a petition for discretionary review violates the due process and equal protection rights of indigent defendants.

Griffin v. Illinois⁹

In *Griffin v. Illinois* the United States Supreme Court recognized, “There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the cost in advance.” 351 U.S. at 18. Thus, while states are not required to provide a particular type of appellate review, if they provide any they must do so in a way that does not “discriminate against some convicted defendants on account of their poverty.” “Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons [] from invidious discriminations. *Id.* (citing U.S. CONST. AMEND XIV).

⁹ 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of convictions which appellate courts would set aside. Many states have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

Id. at 18-19.

Current Texas PDR Process

While a defendant has no right to discretionary review in the Court of Criminal Appeals, there does exist a right to petition for discretionary review. TEX. R. APP. PROC. 66.2, 68.1. While that petition need not contain specific citations to the record, the rules do require that “if the petitioner has access to the record, the petitioner must (after each ground) refer to the page of the record where the matter complained of is found.” TEX. R. APP. PROC. 68.4(g). Based on these rules, the Court has previously held that the “failure to provide a free copy of the record

to an appellant who wishes to file a pro se petition for discretionary review” does not violate the rights of that appellant. *Ex parte Trainer*, 181 S.W.3d 358, 359 (Tex.Crim.App. 2005) (citing *Ex parte Jarrett*, 891 S.W.2d 935, 943 (Tex.Crim.App. 1995)).

It is Time to Revisit the Court’s Prior Holdings

Those cases previously cited in which this Court held that there was no due process or equal protection violation in denying indigent defendants free access to the appellate record when drafting a *pro se* petition for discretionary review fails to consider the reality about which the Supreme Court was concerned in *Griffin* – the high number of cases that are ultimately reversed on appeal. *Griffin*, 351 U.S. at 18. In fact, a review of this Court’s decisions reflects that trend. The most recent statistics show that over half, almost sixty percent, of the cases the Court takes on discretionary review are reversed. Annual Statistical Report for the Texas Judiciary, Fiscal Year 2018 at Court-Level 11, <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf>.

Yet, only seven percent of filed petitions for discretionary review are granted. *Id.* at Court-Level 10. Given the high likelihood of obtaining a favorable outcome if review is granted coupled with the low likelihood of

getting that review, the importance of a thorough, well-written petition for discretionary review cannot be overstated.

There is no doubt that citations to the record in a petition not only enhance the quality of that petition, but also make review of that petition by the Court easier particularly given the limited amount of time the Court can devote to considering each petition. *See Id.* at Court-Level 8 (noting that in 2018 the Court reviewed an enormous number of cases: 4,075 habeas writs, 1,170 petitions for discretionary review, and 699 original proceedings). There can be little doubt then but that those petitioners writing with the benefit of the record are better situated than those working without it.¹⁰ And the reality is whether one has the record is a circumstance almost entirely dependent on one's financial resources. That is, the current PDR system creates the kind of disparate situation where one's access to the Court is significantly influenced by income – a clear violation of the Due Process and Equal Protection rights of the Fourteenth Amendment in application if not facially. Giv-

¹⁰ Consider the circumstance of a petitioner seeking to challenge a lower court's holding on a motion to suppress, *Miranda* violation or other issue where whether that holding is supported by the record in the lower court is the central question to be resolved. *See, e.g., Pecina v. State*, 361 S.W.3d 68, 78-79 (Tex.Crim.App. 2012); *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990) (discussing applicable standards of review). Without the benefit of reference to the record, an appellant cannot begin to seriously outline his argument for the Court.

en this context, the Court should hold that the right to access to the appellate record at no cost extends to an appellant seeking to file a *pro se* petitioner for discretionary review with the Court.

CONCLUSION AND PRAYER

Wherefore, premises considered, Petitioner respectfully prays that the Court:

Reverse the judgment of the Twelfth Court of Appeals because the lower court erred by resolving the merits of appellate counsel's *Anders* brief without first ensuring that Mr. Pendergraft had had an actual, meaningful opportunity to review the record and make the *pro se* response he told the court he desired to make;

Hold that the discretion to craft a solution to ensuring access to the record for an appellant seeking to respond to an *Anders* brief rests with the intermediate appellate court acting in concert with the trial court and appellant's counsel; and

Hold that the importance of an adequately written petition for discretionary review merits the provision of the appellate record without cost to indigent defendants in order to ensure that one's finances do not determine one's access to this Court.

Respectfully submitted,

/s/ Austin Reeve Jackson
Texas Bar No. 24046139
PO Box 8355
Tyler, TX 75711
Telephone: (903) 595-6070
Facsimile: (866) 387-0152

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was delivered to counsel for the State by efile concurrently with its filing in the Court.

/s/Austin Reeve Jackson

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the requirements of Rule 9.4 and consists of 5,085 words.

/s/ Austin Reeve Jackson

APPENDIX A

**10 January 2019 Letter
From James Pendergraft to
Twelfth Court of Appeals**

1-10-19

To: Katrina McClenney Clerk, Twelfth Court of Appeals
1517 West Front Street
Suite 354

Tyler, Texas



Cause No. 12-18-00091-CR
James Pendergraft

RE:

VS

State of Texas

Greetings,

I hope this letter finds you well today. I am writing to you today in reference to cause no. listed above, I am requesting that you would bring to the attention of this Court, that I have not recieved the record in this cause as ordered by this Court. I ask that you inform the court in this cause that James Pendergraft has been established as an indigent in this cause and this court has made an order for the appellate record be provided to him in accordance with *Ander's v. California*.

It has been established in this Court that Mr. Pendergraft is illiterate, being unable to read or write. This Court has ordered that the appellate record be made available to Mr. Pendergraft. I am asking that you would bring to the attention of this Court, that in defiance of this order, that the appellate record still has not been provided to Mr. Pendergraft.

Please, note to this Honorable Court that on 1-7-19 Mr. Pendergraft was provided with notice to report to Mail Room at Gurney Unit.

When Mr. Pendergraft recieved verification of legal records from the Smith County District Clerk, Mrs. Lous Rogers, 100 N. Broadway #204 Tyler, Texas 75702 Certified (7014 3490 0000 1608 1552) the contents of this correspondence being denied to, Mr. Pendergraft, as it being 2 CD's, DVD's & a blank envelope., Mr. Pendergraft, it being on record and documented at the Mail window, that Mr. Pendergraft recieved nothing, and send to the following person at offenders expense.

Please bring this matter to the attention of the Chief Justice of the Twelfth Court of Appeals, as this being the belief of Mr. Pendergraft this being a further attempt to deny him his right to the record in his case on appeal and to further hamper his efforts as an indigent, prose and illiterate to prepare his response to the Ander's brief.

It is well established, that inmates are not allowed access to computers to view ~~CD~~ DVD's without a court order. Appellant James Pendergraft has already made it perfectly clear to his Appellate Counsel, Mr. James Huggler that he is not only indigent, but that he is also illiterate, unable to read or write and Mr. Huggler has made no attempt to aid Mr. Pendergraft, instead he has complicated the process by sending Mr. Pendergraft 2 DVD's and an empty envelope.

My name is Benjamin Edward George, TDCJ# 1788693. I recently met Mr. Pendergraff here at the Gurney Unit and he informed me that he is not able to read or write and needed assistance. I informed Mr. Pendergraff that I was only passing through this unit on my way back to my Unit of assignment coming back from a bench-warrant, charges being dismissed against me in the county.

I informed Mr. Pendergraff that I would make this initial contact with the court on his behalf, to inform the court that his appellate attorney and the district clerk and court reporter still have not provided him with the appellate record in accordance with Anders v. California and Texas Rules of Appellate Procedure.

I am requesting this Honorable Court to consider Mr. Pendergraff's peculiar situation and make a Court Order to the District Clerk Mrs. Lous Rogers, 100 N. Broadway # 204 Tyler, Texas 75702, copy the records certified (7014 3490 0000 1608 1552) that she sent Mr. Pendergraff on DVD's, in a paper format which Mr. Pendergraff can legally possess in TDCJ as legal property.

In addition Mr. Pendergraff would request an appointment of counsel or aid to assist him as being illiterate, unable to read or write, to afford him the help that he needs as I could be shipped back to my unit any time.

Furthermore, to aid Mr. Pendergraft in being certain that he has received the complete appellate record that was originally ordered by his appellate counsel Mr. James Huggler, he requests a Bates numbering system be used to help him identify any missing records as he is not an attorney and is illiterate. This request is not made in an attempt to delay this matter, this is simply being made to ensure that the records are intact in their entirety provided to Mr. Pendergraft in a timely manner, allowing him time to prepare a response to the Anderson's brief that has been filed in his case.

Mr. Pendergraft has informed me that he has repeatedly attempted correspondence with his appellate attorney Mr. Huggler and asked his family to contact him, about a copy of his legal file on Mr. Pendergraft's case, that he generated in the process of his representation of Mr. Pendergraft, but there has been no response. Mr. Pendergraft requests the court's attention to this matter as well, being that it shows a pattern of behavior by Mr. Huggler that would be against his fiduciary duties to Mr. Pendergraft. Please consider making a court order for Mr. Huggler's legal file to be provided to Mr. Pendergraft in a paper format, one that he will be allowed to possess in

TD CJ. Thank You for your time and consideration in this matter,

Sincerely and Respectfully Submitted ~~by~~ for
Mr. James Ray Pendergraft, 2193113, Gurney Unit
1285 E. 38th St. P.O. Box 113, Gurney, MO 64456

Mr. Pendergraff would further like to inform this court that he is now being housed at the Gurney Unit in Palestine Texas, Him being off the Unit 2 separate times, once on a medical emergency, being hospitalized for approximately for 7 day due to his spleen being ruptured in 2 places due to a fall on the Gurney Unit, and the second being bench warranted back to the County. Mr. Pendergraff's mail has been piling up on the Coffield Unit, 2661 F.M. 2054, Tennessee Colony, Tx 75884. Mr. Pendergraff is asking the court to take notice that his mail is just now getting to him here at the Gurney Unit. In addition, Mr. Pendergraff was never provided with a copy of the appellate Rules to aid him in preparing his brief, by the court (district or his Attorney.

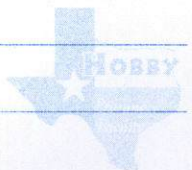
Sincerely,

James Ray Pendergraff
TDCJ# 2193113

Gurney Unit
1385 F.M. 3328

Palestine, Texas 75803

Please time Stamp this original letter and return it in your response. Thank You, again for your time and consideration.



APPENDIX B

**20 February 2019 Letter
From Twelfth Court of Appeals
to James Pendergraft
Denying Paper Copies of Records**



CHIEF JUSTICE
JAMES T. WORTHEN

JUSTICES
BRIAN HOYLE
GREG NEELEY

CLERK
KATRINA MCCLENNY

CHIEF STAFF ATTORNEY
KERI L. HUNT

TWELFTH COURT OF APPEALS

February 20, 2019

Mr. James W. Huggler Jr.
100 East Ferguson
Suite 805
Tyler, TX 75702
* DELIVERED VIA E-MAIL *

Mr. Michael J. West
Asst. District Attorney
4th Floor, Courthouse
100 North Broadway
Tyler, TX 75702
* DELIVERED VIA E-MAIL *

James Ray Pendergraft
#02193113
Gurney Unit
1385 FM 3328
Palestine, TX 75803

RE: Case Number: 12-18-00091-CR
Trial Court Case Number: 007-1264-17

Style: James Ray Pendergraft
v.
The State of Texas

You are hereby notified that in the above described case, the following decision and order was this day made and entered by this Court:

"THIS DAY came on to be considered Appellant's Pro Se Motion Requesting Paper Records herein; and the same being inspected, it is **ORDERED** that said motion be, and hereby is, **OVERRULED for failure to comply with TEX. R. APP. P. 9.5.**"

Very truly yours,

By: Katrina McClenny
Katrina McClenny, Clerk

APPENDIX C

Appellate Counsel's Motion to Extend Time to File *Pro Se* Brief

1. This case is on appeal from the 7th Judicial District Court of Smith County, Texas.
2. The case below was styled *State of Texas v. James Ray Pendergraft*, and numbered 007-1264-17.
3. Appellant was convicted Aggravated Assault with a Deadly Weapon on March 29, 2018.
4. Appellant was assessed a sentence of thirty-five (35) years in the Texas Department of Criminal Justice-Institutional Division.
5. Notice of Appeal was given on April 9, 2018.
6. The Clerk's Record was filed on May 10, 2018 and supplemented on May 29, 2018; the Reporter's Record was filed on April 23, 2018. The Appellant's Brief was filed with the Court on September 10, 2018 and the State's Reply Brief was filed on September 12, 2018.
7. The Appellant's Pro Brief is due on December 20, 2018. Appellant

requests an extension of time for thirty (30) days due to the following referenced facts and circumstances.

8. Appellant requests an extension of time due to the following facts and circumstances. Counsel received a letter from the Appellant written by Mr. Juan Navarro for James Pendergraft dated December 17, 2018. Since the record was completed and Appellant was returned to Smith County, Texas on October 27, 2018, to review the Clerk's Record and the Reporter's Record. At a hearing in this matter it was confirmed the Appellant does not read or write. However, the Appellant informed the Court that he had someone at his current unit do his legal work for him and that he needed a copy of the records to carry to his unit. The trial court approved the sending of an electronic copy (CD) of the record to the Defendant to use on appeal. Since returning to the Texas Department of Criminal Justice Institutional Division, specifically the Gurney Unit, 1385 FM 3328, Palestine, Texas, 75803, the Appellant has not received a copy of clerk's records or the reporter's records. Counsel received a letter dated December 17, 2018 from Mr. Pendergraft stating that he has not received the record from the trial court. Counsel attempted to contact the trial court regarding the record, and as of this filing, has not received a response.
9. Therefore, the Appellant seeks an order: (1) directing the trial court forward the clerk's record and the reporter's records to him at the Gurney Unit; and (2) extending the deadline for thirty (30) days following his receipt of the record to file his pro se brief; and for such other and further relief as the Court may deem appropriate.

Respectfully submitted,

Law Office of James W. Huggler, Jr.
100 E. Ferguson, Suite 805
Tyler, Texas 75702
Tel: (903) 593-2400
Fax: (903) 593-3830

By: /S/ James W. Huggler, Jr. For
James Pendergraft, pro se
James W. Huggler, Jr.
State Bar No. 00795437
Attorney for APPELLANT
Email: jhugglerlaw@sbcglobal.net

CERTIFICATE OF SERVICE

This is to certify that on December 19, 2018, a true and correct copy of the above and foregoing document was served on Mike West, Smith County District Attorney's Office, 100 North Broadway Ave., 4th Floor, Smith County Courthouse, Tyler, Texas 75702, by electronic filing.

/S/ James W. Huggler, Jr. For
James Pendergraft, pro se
James W. Huggler, Jr.

APPENDIX D

**Request for a Copy of the Appellate Record
to Twelfth Court of Appeals**

For the Purpose of Pursuing a *Pro Se* PDR

James Ray Pendergraft
#02193113 - Coffield Unit
2661 F.M. 2054

Tennessee Colony, Texas 75884-5000



Twelfth Court of Appeals
Clerk of the Court
1517 West Front Street, Suite 354
Tyler, Texas 75702

June 14, 2019

RE: Case No. 12-18-00091-CR; Trial Court Case No. 007-1264-17
James Ray Pendergraft v. State of Texas.

Dear Clerk of the Court:

I am proceeding Pro se on my Petition For Discretionary Review. I was bench warranted back to Smith County to review records. It was put on the record; (1) that I am unable to read and write because I don't know how (2) that I am without Counsel on PDR (3) that I can only get help through the unit law library volunteer to help with my legal issues/ appeal.

I have been trying to get copies of the appellate record to file a pro se petition for discretionary review. TDCJ will not let inmates have C.D.'s because we have no way to access the files or print them. So our only options in TDCJ as inmates to send these C.D.'s to a friend or family member and have them print the record and mail directly to us. I am more than willing to do this If I was able to get a C.D. with the record of appeal including but not limited to the reporter's record, clerk's record, direct appeal record, and any other reports that may exist.

My daughter has a full power of attorney to handle my affairs. So I am requesting a copy of the appeal record so that I may get the help of the unit law library to file a PDR prose, and please be advised that my filing deadline for the Pro se PDR is July 16, 2019.

I have wrote my direct appeal attorney also to try and get help with the record of appeal to complete the pro se PDR. I sent my

direct appeal attorney a letter requesting help on the same day as I am sending this Court the same letter requesting help. I want to thank you this Court for all the time and help they may be able to render.

Sincerely,


James Ray Pendergraft
Pro se.

APPENDIX E

**Letter From the Twelfth Court of Appeals
Relating to the Cost of Obtaining a Copy of
the Appellate Record.**



CHIEF JUSTICE
JAMES T. WORTHEN

JUSTICES
BRIAN HOYLE
GREG NEELEY

CLERK
KATRINA MCCLenny

CHIEF STAFF ATTORNEY
KERI L. HUNT

TWELFTH COURT OF APPEALS

Thursday, June 27, 2019

James Ray Pendergraft
#02193113
Gurney Unit
1385 FM 3328
Palestine, TX 75803

RE: Case Number: 12-18-00091-CR
Trial Court Case Number: 007-1264-17

Style: James Ray Pendergraft
v.
The State of Texas

This is to acknowledge receipt of your communication dated June 19, 2019.

In response to your inquiries, please be advised that:

This Court must charge \$0.10 per page for copies of the first 50 pages and \$1.00 per page on each additional copy. You have requested a copy of the reporter's record and the clerk's record. The total cost for these two records will be \$688.00. To receive a copy of said documents, please forward a cashier's check or money order in the amount of \$688.00.

However, please be more specific on the documents that you wish to obtain from this Court. The same copy rates apply to those documents.

Very truly yours,

By: Amie Castle
Amie Castle, Deputy Clerk